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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 711

VIDA JANE McMILLON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For the Fifth Circuit

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VIDA JANE McMILLON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fifth Circuit

VIDA JANE McMILLON prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming her conviction for violation of Sections 371 and 472, Title 18, United States Code, which relate to possession, concealing, and attempting to pass counterfeit obligations of the United States, and conspiracy to achieve said purpose.

Opinions Below

The District Court for the Southern District of Texas did not render an opinion in this case, in which a jury convicted her of six counts. The opinion of the Court

of Appeals affirming the conviction has not yet been reported, but is reproduced as Appendix "A" to this petition.

Petitioner was allowed to proceed with appeal on single typewritten copy of record. (R. 311)

Jurisdiction

The opinion (Appendix "A", R. 314-316) and judgment (Appendix "B", R. 317) of the Court of Appeals are dated December 10, 1959. A petition for rehearing (R. 318-319), timely filed, was denied January 22, 1960 (R. 320). The jurisdiction of this Court is invoked under Section 1251 (1), Title 28, United States Code.

Questions Presented

Whether conviction upon the procedures used here offend due process of law where:

(a) No evidence was offered pointing out distinction between counterfeit bills and a genuine bill;

(b) The evidence failed to establish petitioner's knowledge that the notes were counterfeit; and

(c) The government failed to establish the falsity of the exculpatory statement of petitioner.

Statement of the Case

A.

No evidence was offered showing distinction between counterfeit bills presented in evidence and a genuine bill.

Lane Bertram, United States Secret Service Agent (R. 98, 172), said that Petitioner was turned over to him for questioning by the store detective of Foley's De-

partment Store in Houston, Texas, on December 12, 1958 (R. 98). Mr. Bertram questioned Petitioner concerning the $100 bill which she presented to a clerk in Foley's Department Store, Houston, Texas, in connection with a purchase she had made (R. 69, 70), and made inquiry of Petitioner as to whether she had any further bills (R. 113, 136, 137). Petitioner "was very cooperative," (R. 138) and the Secret Service Agent stated that "she believed that the notes were genuine" (R. 149). Petitioner, in response to questioning by the Secret Service Agent, stated that she received these bills from a person named Al Capri in Chicago, Illinois (R. 146, 147). That "she did not know that they were counterfeit" (R. 175). The circumstances of the reception of these bills is best expressed by the following excerpts from the record:

> "She stated that on that evening, which would have been November the 29th, Mrs. Kirk arrived in Chicago, and that the two of them met Mr. Capri and were out during the evening, having gone to the Chez Paree and two or three other places of entertainment; one, I believe, was the Blackhawk, and that they had ended up at the Congress Hotel sometime around 5:00 or 6:00 A. M. the following morning; and at that time Miss McMillon stated that Mrs. Kirk was wearing a mink stole; that during the evening, she had hinted or indicated to Capri that she would like to have a mink stole.
>
> "So, while they were in his room at the Congress Hotel, the mink stole—she indicated again that she would like to have a mink stole, and Capri gave her $5,000.00 in these notes, and advised her to buy the mink stole for herself, and then for she and Mrs. Kirk to divide the rest and do their shopping." (R. 184, 185, 186).

"Miss McMillon contended that she was an innocent victim, that she did not know the notes were counterfeit; she was told that the matter would be thoroughly investigated, and her cooperation would be appreciated, that we were primarily concerned with reaching the source of the manufacture of these notes." (R. 193).

"Miss McMillon stated that she would testify, yes, sir." ". . . that she would identify him?" R. 204.

"Miss McMillon did indicate that she would be willing to testify against this man, Al Capri, if identified and located." (R. 150).

Petitioner voluntarily consented to a search of her room at the Shamrock-Hilton (R. 180, 191), Houston, Texas, and specifically advised said Secret Service Agent where he would find the remaining bills (R. 138, 176, 179). Petitioner was adamant that she "did not know they were counterfeit." (R. 170, 220)

She stated that the "only reason I put them there (in her shoes) is because I am not used to walking around with that kind of money, and for the safety of it, I mean, I have had my purse cut off my arm before. That is the only reason I put them in my shoes." (R. 171)

Further, she placed the bills behind the mirror in the room occupied by her at the Shamrock-Hilton Hotel in Houston, Texas, because while "it would have been much better to have put them in the safe for the safety of them, but like I say, I . . . there was no particular reason; we just were going out and put them there." (R. 168)

Without any comparison whatsoever between the counterfeit bills and genuine bills, and without pointing out any of the characteristics existing between the bills offered

in evidence and genuine bills, the Secret Service Agent was permitted to testify that all of the bills recovered from Petitioner were counterfeit (R. 176). This witness was the only person testifying as to the genuineness and validity of the bills and obligations recovered from Petitioner.

B.

The evidence failed to establish Petitioner's knowledge that the notes were counterfeit.

The government's sole witness, Lane Bertram, United States Secret Service Agent, stated that petitioner not only contended "that she was an innocent victim" (R. 193), but readily stated that she would identify the person who gave her the bills in Chicago, Illinois (R. 204), and "that she would be willing to testify against this man, Al Capri, if identified and located (R. 150).

This same government witness stated that Petitioner was ". . . very co-operative and sincere in that she believed that the notes—which she voluntarily surrendered to the Secret Service Agent—were genuine" (R. 149). His testimony further disclosed that Petitioner stated to him "if the notes were counterfeit that she did not want to have anything to do with them, that she did not know they were and that, in effect, she wanted to get them into the proper hands." (R. 148).

This same witness stated that Petitioner voluntarily consented to a search of her hotel room (R. 180, 191), and told him where he would find the remaining bills (R. 138, 176, 179). That she unhesitatingly disclosed the source of these bills and the circumstances under which she received them (R. 184, 185, 186, 187, 193).

A government witness, an employee of a department store in Dallas, Texas, stated that Petitioner made a purchase at said store and gave a $100 bill as payment (R. 224, 225). This government witness stated that she then took the bill to a cashier in the store and that when she returned to where Petitioner was standing, she stated to Petitioner that the cashier "didn't think it was a good bill" (R. 225). This was objected to by Petitioner on the ground that it was pure hearsay, but the Court limited the statement merely as to indicate whether Petitioner had been advised concerning the authenticity of the bill (R. 227). The cashier of said store, although available to the government, did not appear, hence the value of such statement is destroyed, even for the limited purpose expressed by the Trial Judge.

When Petitioner was questioned concerning this statement having been made to her by the Clerk in the Dallas, Texas, store by a govern[redacted]itness, a Secret Service Agent, Dallas, Texas, she [redacted] that any such statement was made (R. 245, 246).

C.

The government failed to establish the falsity of the exculpatory statement of Petitioner.

Through the government's principal witness, Lane Bertram, Secret Service Agent of the United States, there was introduced in evidence a statement of Petitioner in which she denied any knowledge of these notes being counterfeit or professed any information which would put her on notice that said instruments were not valid. The statement introduced by the government, in writing (R. 161) is as follows:

"I do not have anything to hide and want to cooperate and get this matter cleared up as soon as practical."

"Miss McMillon stated that if the notes were counterfeit, that she didn't want to have anything to do with them, that she didn't know they were, and that, in effect, that she wanted to get them into the proper hands." (R. 148)

As to the source, and the circumstances under which Petitioner received these notes, the following is the undisputed testimony from the main government witness:

"Miss McMillon, rather—said that she had gotten the notes from a man by the name of Al Capri in Chicago, and she didn't know that they were counterfeit, and if they were so, that she didn't want to have any part of them, and that's when she told me about the notes out at the hotel, and I asked her if she would sign a statement authorizing us to search the hotel." (R. 146-147)

"She said that she had received that and other notes from a man by the name of—that she knew as Al Capri."

"She said she did not know that it was counterfeit." (R. 175)

"Miss McMillon said that she received the first one thousand dollars of those notes about November the 28th, 1958, in Chicago, Illinois, from the same man that she referred to as Al Capri, who was living at the Congress Hotel at the time that she saw him or knew him.

"On that night, she advised that she went shopping with ten of these notes, that she spent nine of them in Chicago, and that she was supposed to see Mr.

Capri later in the evening, after she had gone shopping, but that she was—didn't call him.

"But the following day, she received a call from him, or he called her and was angry or annoyed about why she had not called him the previous evening. During that conversation, she advised that Capri stated that—or asked her if she had gone shopping, and showed unusual interest in her shopping, wanted to know what she purchased, and so forth. She stated that during that telephone conversation, she advised Mr. Capri that she had a friend, Julia, coming in from Texas, and at the same time she made an appointment to see him that evening.

"Now, you are still talking about Mrs. McMillon?

"I am still talking about Mrs. McMillon. I believe that they were—according to her story, I believe it was the Chez Paree, they were to meet about 8:00 or 8:30.

"Now where did Mrs. McMillon tell you that she and Miss Kirk got the additional one hundred dollar bills, beside the first thousand?

"She stated that on that evening, which would have been November the 29th, Mrs. Kirk arrived in Chicago, and that the two of them met Mr. Capri and were out during the evening, having gone to the Chez Paree and two or three other places of entertainment; one I believe, was the Blackhawk, and that they had ended up at the Congress Hotel sometime around 5:00 or 6:00 A. M. the following morning; and at that time, Miss McMillon stated that Mrs. Kirk was wearing a mink stole; that during the evening, she had hinted or indicated to Capri that she would like to have a mink stole.

"So, while they were in his room at the Congress Hotel, the mink stole—she indicated again that she

would like to have a mink stole, and Capri gave her $5,000.00 in these notes, and advised her to buy the mink stole for herself, and then for she and Mrs. Kirk to divide the rest and do their shopping." (R. 184, 185, 186)

"Mrs. Kirk says that she went to Chicago sometime the latter part of November, and contacted Miss McMillon, and that they went out, met the man named Al Capri, were with him during most of the evening at various places of entertainment, arrived at the Congress Hotel sometime around 5:00 or 6:00 in the early morning, during which time Capri gave them the $5,000.00, or actually gave it to Miss McMillon, advising her to purchase herself a mink stole and to divide the rest with Mrs. Kirk." (R. 187)

"Miss McMillon contended that she was an innocent victim, that *she did not know* the notes were counterfeit; she was told that the matter would be thoroughly investigated, and her cooperation would be appreciated, that we were primarily concerned with reaching the source of the manufacture of these notes." (R. 193)

"Miss McMillon stated she would testify, yes, sir."

" . . . that she would identify him?" (R. 204)

"Miss McMillon did indicate that she would be willing to testify against this man, Al Capri, if identified and located." (R. 150)

D.

The Trial and the Appeal.

Petitioner objected (R. 225, 227) to the admissibility of the statement made by an employee of A. Harris Company, Dallas, Texas, stating that the cashier, in the absence of Petitioner, told said employee that she—meaning

the cashier—didn't think it was a good bill. The Trial Judge in effect, agreed with Petitioner's counsel that said statement made by the absent cashier to the other employee, who, in turn, told Petitioner what the cashier had said, constituted hearsay, but, nevertheless, admitted such statement as indicating whether petitioner was advised concerning the validity of the bill in question. (R. 227) This was tantamount to overruling the objection made to such statement. Later, a Secret Service Agent in Dallas, Texas, questioned Petitioner as to what actually happened in the Harris store, Dallas, Texas, and he disclosed that Petitioner denied that any such statement was made. (R. 245, 256)

The Fifth Circuit affirmed the judgment of the Trial Court. (R. 314)

Reasons For Granting The Writ

A.

There is no evidence showing distinction between counterfeit bills presented in evidence and a genuine bill.

Some of this Court's most cited opinions have required that knowledge that the bill in question is a forgery and a counterfeit, is essential to make out the crime. Absent such essential ingredients, conviction cannot stand. *U. S. v. Carll*, 105 U.S. 611, 613. It is submitted that no authority can be found for the proposition that conviction may be had without expressly demonstrating by competent and legal evidence that the possessor of such bills or notes had specific knowledge of their being counterfeit.

An examination of the notes in question reveals that the average person would accept them as being genuine.

This is demonstrated by the fact that in several of the stores visited by Petitioner the notes were accepted without any detection that they were spurious. The appearance of these notes cannot be relied upon to fasten to Petitioner the knowledge that they were not genuine.

No attempt was made by the government to submit legal evidence pointing out a distinction between the counterfeit bills in issue and a genuine bill, so as to guide the jury and permit it to legally draw a comparison which would have shown knowledge by Petitioner from possession alone.

Without pointing up any distinction, and without otherwise demonstrating the difference between genuine and counterfeit notes, the government through the Secret Service Agent, Lane Bertram, merely stated that all of the bills offered in evidence were counterfeit (R. 176).

It is equally certain that the statement made by government witness, Johnson (R. 225) standing by itself, fails to meet the requirement of the statute and the principles enunciated in such cases as *United States v. Carll*, 105 U.S. 611, 613; *Marson v. United States*, 203 F. 2d 904, 906; *United States v. Ruffino*, 67 F. 2d 441. Witness Johnson's testimony is in the nature of "IT WAS REPORTED TO ME" statement. It is but an indirect method of reporting information received from a third party. Obviously there can be no question as to the hearsay character of such statement.

A presumption can fix neither the burden of going forward nor the burden of persuasion unless there is a logical connection between the basic fact and the presumed fact. This is most apparent in this cause. Even a presumption with the requisite logical connection is not valid if it tends

to fix either burden upon Petitioner unless its application has the effect of avoiding procedural inconvenience without unfairness or hardship to Petitioner. *Tot v. United States*, 319 U.S. 463.

Clearly, the government failed to establish guilt on the part of Petitioner.

B.

Knowledge that the notes were counterfeit was not shown to be possessed by Petitioner.

To sustain a charge of this character, it is incumbent upon the government to prove, beyond a reasonable doubt, that Petitioner possessed knowledge that the bills were counterfeit and that the bills passed were accompanied with the intent to defraud.

It is here that the government's case against Petitioner falls, because it did not:

(a) "Establish by some evidence Petitioner's knowledge that the note was a counterfeit bill and was uttered or passed with intent to defraud;"

(b) Offer evidence "pointing out a distinction between this counterfeit bill and a genuine * * * bill which might have guided the jury and permitted it to legally draw a comparison which would have shown knowledge on the part of Petitioner from * * * possession alone;"

(c) Show passage of the notes and bills to store keepers does not constitute "circumstance alone * * * to presume guilty knowledge or intent to defraud which must be proved beyond a reasonable doubt;"

(d) "Although the bill admittedly is a counterfeit, there is lack of evidence of its knowledge of being a counterfeit on the part of Petitioner;". *United States v. Ruffino*, 67 F. 2d 441; *Andreus v. United States*, 157 F. 2d 723;

(e) "The naked act of possessing and passing counterfeit money does not give rise to a legitimate inference of guilty knowledge * * * and the evidence of such knowledge has to be proved beyond a reasonable doubt;" *Marson v. United States*, 203 F. 2d 904, 906; and

(f) "Knowledge that the instrument is forged and counterfeited is essential to make out the crime * * *"; *United States v. Carll*, 105 U.S. 611, 613.

There is no testimony appearing in this record even tending to meet the sanctions of these well-reasoned cases which interpret the statute relating to the crime of counterfeiting in general.

The primary burden imposed upon the government was to establish by substantial evidence that Petitioner violated the statute with which she was charged and was required to show by clear and substantial evidence that the matters charged in the indictment were committed by her. This record is not "productive of evidence from which a jury could properly find beyond a reasonable doubt" the requisite, specific knowledge and intent. *Hartsell v. United States*, 322 U.S. 680, 687.

The evidence relied upon for conviction in this cause is not substantial evidence. It is not evidence to support a conviction without gross offense to the Fifth Amendment.

C.

The government failed to establish the falsity of the exculpatory statement of petitioner.

Petitioner's statement given to United States Secret Service Agent, Lane Bertram, was introduced by the government through this agent. The full import of such statement appears in the record. (R. 138, 146-147, 161, 175, 184, 185, 186, 187, 193, 204). The gist of this statement was that Petitioner did not know the bills in question were counterfeit; that she would identify the man who gave her these bills in Chicago, Illinois; and would even testify against him (R. 150, 204).

That because of her lack of knowledge as to the validity of these bills, she was an innocent victim, and she, accordingly, desired that a thorough investigation be made.

This statement stands undisputed in this record. No evidence whatsoever was introduced by the government to contradict any part of Petitioner's statement and nothing was presented to show that the statement was untrue and otherwise false.

The absence of such evidence to contradict any phase of this statement creates a presumption that the exculpatory statement was true. *Young v. United States*, 97 F. 2d 200, 202.

Inasmuch as the government offered no evidence to contradict any part of said statement, it is bound by the content of such statement.

The requirement for substantial evidence, that there must be proof beyond a reasonable doubt, is illustrated in a number of decisions from this Court. *Abrams, et al. v.*

United States, 250 U.S. 616, 619; *Mortensen v. United States*, 322 U.S. 369, 374.

The evidence in this case is without conflict insofar as lack of knowledge on the part of Petitioner is concerned.

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the fact-finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedence." *Speiser v. Randall*, 357 U.S. 513, 520.

Conclusion

For the reasons stated a Writ of Certiorari should issue to review the judgment of the United States Court of Appeal for the Fifth Circuit.

Respectfully submitted,

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Houston 2, Texas
Counsel for Petitioner

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17730

VIDA JANE McMILLON,
Appellant,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(December 10, 1959)

Before RIVES, Chief Judge, and HUTCHESON and TUTTLE, Circuit Judges.

PER CURIAM: Tried to a jury on an indictment charging a conspiracy to pass, and substantive offenses respecting, counterfeit obligations of the United States, and her motion for judgment of acquittal denied, defendant was convicted and sentenced, and she has appealed upon three points of error. These, differing in wording but the same in substance, present the claim

that the court erred in overruling her motion for acquittal and in adjudging her guilty because the evidence failed to establish as to her the essence of the offense, that the bills were counterfeit and that she had guilty knowledge that they were.

Appellee, pointing to the undisputed evidence of the government agent, a part of which is copied into appellant's brief, narrating the bizarre and incredible story appellant told him about the notes and her connection with them which shows beyond any question that the claim, that those passing the notes did not know they were counterfeit, is completely and utterly fantastic; and to the fact that appellant offered no evidence; urges upon us that the appeal is without merit and the judgment must be affirmed.

Giving full effect to the rule stated by this court in *Young v. United States*, 97 F (2) 200, and here invoked by appellant, as to the effect of the introduction by the government of exculpatory statements, it is sufficient to say: that the statement taken as a whole is not exculpatory but exceedingly inculpatory; and that we find ourselves in complete agreement with appellee's view that the evidence, including particularly appellant's own statement to the government agent, as testified to by him without contradiction of any kind by her, overwhelmingly established her knowledge that the notes were not genuine but counterfeit, and that she was bound to have known that she was embarking upon a dangerous criminal mission.

In short, without undertaking to set out the evidence of appellant's fantastic dealings with her benefactor, Al Capri, from whom she says she got the notes without

money and without price, and taking the evidence as a whole, we think it plain that no other reasonable conclusion could have been drawn from it by the jury than that she knew that the notes which were so lavishly bestowed upon her by a stranger were counterfeit, and that her mission was to pass them when and how she could.

The trial was without error. The judgment is AFFIRMED.

A true copy
Test:

EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana.

Jan. 28, 1960

APPENDIX "B"

JUDGMENT.

Extract from the Minutes of December 10, 1959.

VIDA JANE McMILLON,

NO. 17730. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.